U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF P-S- INC.

DATE: JUNE 21, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a software development and consultancy services company, seeks to employ the Beneficiary as a senior systems analyst. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Acting Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that the offered position requires a professional with an advanced degree.

On appeal, the Petitioner submits additional evidence and asserts that the Director misread the requirements listed on the labor certification. It states that the offered position requires a professional with an advanced degree.

Upon *de novo* review, we will withdraw the Director's decision and remand the matter for further proceedings consistent with our opinion and for the entry of a new decision.

I. LAW

A. The Employment-Based Immigration Process

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is February 21, 2017. *See* 8 C.F.R. § 204.5(d).

Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national applies for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

B. Advanced Degree Professional

The regulation at 8 C.F.R. § 204.5(k)(2) defines the term "advanced degree" as:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

> (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
>
> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, the job offer portion of the labor certification must require a professional holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(i).

II. REQUIREMENTS OF THE OFFERED POSITION

The Director concluded that the Petitioner did not establish that the offered position of senior systems analyst requires a professional with an advanced degree. The key to determining the job qualifications is found on ETA Form 9089, Application for Permanent Employment Certification, at Part H. This section describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Section H of the labor certification states that the offered position has the following minimum requirements:

> H.4. Education: Bachelor's degree in computer science or engineering or IT or IS.
> H.5. Training: None required.
> H.6. Experience in the job offered: 60 months.

H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: Master's degree and two years of experience.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: 24 months as a programmer or analyst.
H.14. Specific skills or other requirements: Education and Experience required: Bachelor's degree in Computer Science or Engineering or IT or IS plus 5 years progressive experience in job offered or as Programmer or Analyst. In lieu of Bachelor's degree and 5 years experience will accept Master's degree in Computer Science or Engineering or IT or IS plus 2 years progressive experience in job offered or as Programmer or Analyst. Prior work experience must include 2 years experience in ASP.NET, C#.NET, Microsoft.Net, ADO.Net, SQL Server, WPF, WCF, Visual Basic, MVC, Silverlight.

In this case, the Director determined that the entry at Part H.10 permits an applicant to qualify for the position based on a bachelor's degree plus 24 months of experience. Thus, he determined that the offered position does not require a professional holding an advanced degree because an applicant may qualify for the job with less than a bachelor's degree followed by at least five years of progressive experience. However, this interpretation disregards Part H.14, which summarizes the education and experience required for the offered position.

On appeal, the Petitioner submits the recruitment that it conducted for the offered job, including the prevailing wage determination, the California job order, the notice of posting of the job opportunity, its internal advertisements and postings, and its newspaper advertisements. It asserts that its minimum requirements for the offered job are a bachelor's degree in computer science, engineering, IT, or IS plus five years of progressive experience in job offered or as a programmer or analyst; or, in the alternative, a master's degree in computer science, engineering, IT, or IS plus two years progressive experience in job offered or as a programmer or analyst. It states that it never intended to permit an applicant to qualify for the position based on a bachelor's degree plus 24 months of experience, as evidenced by its labor certification entry at H.14 and its recruitment for the offered position.

Part H.14 of the labor certification summarizes the education and experience required for the offered position. Further, where the Petitioner's recruitment specifies the minimum requirements for the offered job, it specifically indicates that the minimum requirements are a bachelor's degree in computer science, engineering, IT, or IS plus five years of progressive experience in the job offered or as a programmer or analyst; or, in the alternative, a master's degree in computer science, engineering, IT, or IS plus two years of progressive experience in the job offered or as a programmer or analyst.

Based on our review of entirety of the labor certification, we find that the offered position requires a professional holding an advanced degree. The Petitioner's recruitment for the offered job supports

this finding. Therefore, we will withdraw the Director's finding on this issue. However, we will remand the case for the reasons set forth below.

III. THE BENEFICIARY'S EXPERIENCE

Although not addressed by the Director, the Petitioner did not establish that the Beneficiary possessed the experience required by the labor certification as of the priority date. The Petitioner asserts that the Beneficiary qualifies for the offered job based on his bachelor's degree plus five years of progressive experience, including two years of experience in ASP.NET, C#.NET, Microsoft.Net, ADO.Net, SQL Server, WPF, WCF, Visual Basic, MVC, Silverlight.

A beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). The labor certification lists the Beneficiary's experience as follows:

- Computer programmer analyst with the Petitioner from December 8, 2014, to the date the labor certification was filed;
- Assistant Manager-Software/Analyst with [redacted] in New Jersey from April 1, 2012, to December 3, 2014;
- Lead-Software/Analyst with [redacted] in India from July 11, 2011, to March 31, 2012;
- Lead-Software/Analyst with [redacted] in New Jersey from April 4, 2011, to July 9, 2011; and
- Lead-Software/Analyst with [redacted] in India from April 23, 2007, to April 2, 2011.

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. *See* 8 C.F.R. § 204.5(g)(1).

The record contains the following documentation regarding the Beneficiary's experience:

- Letter dated January 14, 2015, from [redacted]. stating that the Beneficiary was employed in the United States from March 31, 2012, through December 3, 2014, and that at the time of leaving, he was working as "Assistant Manager – Software." The letter states that the Beneficiary joined [redacted] in India on April 23, 2007. However, the letter does not give a specific description of the duties performed by the Beneficiary as required by 8 C.F.R. § 204.5(g)(1). Therefore, it does not confirm the Beneficiary's experience with [redacted] or [redacted]
- Offer letter dated March 22, 2007, from [redacted] to the Beneficiary. The letter offers the Beneficiary a position as Senior Associate – Software starting on or before April 23, 2007. However, the letter does not give a specific description of the duties

performed by the Beneficiary as required by 8 C.F.R. § 204.5(g)(1), and it does not confirm his actual employment with

- A letter dated April 23, 2007, from to the Beneficiary. The letter details the salary, benefits, and other terms of the Beneficiary's proposed job as Senior Associate – Software. However, the letter does not give a specific description of the duties performed by the Beneficiary as required by 8 C.F.R. § 204.5(g)(1), and it does not confirm his actual employment with
- A statement of work dated May 14, 2017, from The statement indicates that was employed with in India as an associate specialist from April 23, 2007, to April 27, 2012, and that the Beneficiary worked as a "Lead Software/Analyst" under the direct supervision of from March 2008 to December 2010. The statement describes the Beneficiary's duties during this period. The statement confirms less than three years of the Beneficiary's experience as a lead software/analyst.[2]

The Petitioner has not established that the Beneficiary possessed the experience required by the labor certification as of the priority date. Specifically, it has not established that the Beneficiary had five years of progressive post-baccalaureate experience as a senior systems analyst, or as a programmer or analyst. On remand, the Director shall consider whether the Beneficiary possesses the required experience for the offered job.

IV. ABILITY TO PAY THE PROFFERED WAGE

Although not addressed by the Director, the Petitioner has not established its continuing ability to pay the combined proffered wages of all of its applicable beneficiaries. The proffered wage in this case is $134,971.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

[2] The statement also confirms the Beneficiary's two years of experience with ASP.NET, C#.NET, Microsoft.Net, ADO.Net, SQL Server, WPF, WCF, Visual Basic, MVC, and Silverlight.

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage.[3]

The Petitioner submitted copies of paychecks demonstrating that it paid the Beneficiary $53,234.50 through May 31, 2017. The amounts on the paychecks do not equal or exceed the annual proffered wage of $134,971. The record therefore does not establish the Petitioner's ability to pay the proffered wage based on the wages it paid to the Beneficiary. But we credit the Petitioner's payments to the Beneficiary. The Petitioner need only demonstrate its ability to pay the difference between the annual proffered wage and the amounts it paid to the Beneficiary, which is $81,736.50 in 2017.

The Petitioner provided its 2015 federal tax return covering its fiscal year starting April 1, 2015, and ending March 31, 2016.[4] However, the Petitioner did not provide regulatory-prescribed evidence of its ability to pay the proffered wage from the priority date of February 21, 2017, onward. *See* 8 C.F.R. § 204.5(g)(2).

The Petitioner also submitted a letter dated May 5, 2017, from its general manager of finance, stating that the Petitioner "has more than 500 employees on its US payroll" and that it has the ability to pay the proffered wage to the Beneficiary. However, where a petitioner has filed Form I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. *See* 8 C.F.R. § 204.5(g)(2); *see also Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). USCIS records show that the Petitioner has filed multiple Form I-140 petitions for other beneficiaries. Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other Form I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition.[5] Given the

[3] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, -- F. Supp. 3d --, 2015 WL 3634497, *5 (S.D. Cal. 2015); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, -- Fed. Appx. --, 2015 WL 5711445, *1 (5th Cir. Sept. 30, 2015).

[4] We note that the record contains only a partial 2015 tax return. It also contains a partial 2014 federal tax return. The 2014 return was filed as a consolidated return on behalf of the Petitioner and its subsidiaries. The 2015 return does not indicate that it was filed as a consolidated return, and the record does not indicate that the group was granted permission by the Internal Revenue Service to discontinue filing consolidated returns. *See* 26 C.F.R. § 1.1502-75(c). A group which filed a consolidated return for the immediately preceding taxable year is required to file a consolidated return for the taxable year unless it has an election to discontinue filing consolidated returns. 26 C.F.R. § 1.1502-75(a)(2). On remand, this ambiguity should be resolved with independent, objective evidence. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

[5] The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

number of petitions filed by the Petitioner, the lack of financial evidence for the Petitioner in 2017, and the noted ambiguity in the Petitioner's 2014 and 2015 tax returns, we decline to accept the letter from the Petitioner as evidence of the Petitioner's ability to pay the proffered wage. On remand, the Director shall consider whether the Petitioner has the continuing ability to pay the combined proffered wages of all of its applicable beneficiaries.

V. CONCLUSION

The decision of the Director will be withdrawn. The matter is remanded to the Director for consideration of whether the Beneficiary possesses the required experience for the offered job, and whether the Petitioner has the ability to pay the combined proffered wages of all of its applicable beneficiaries. The Director may request any additional evidence considered pertinent. Similarly, the Petitioner may provide additional evidence within a reasonable period of time to be determined by the Director. Upon receipt of all the evidence, the Director will review the entire record and enter a new decision.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of P-S- Inc.*, ID# 1493283 (AAO June 21, 2018)

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.